

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

10/04/2001

CLERK OF THE COURT  
FORM L000

HONORABLE MICHAEL D. JONES

M. Cearfoss  
Deputy

LC 2001-000285

FILED: \_\_\_\_\_

JEFFREY SCOTT THOREN

KRISTEN M CURRY

v.

STATE OF ARIZONA

SAMUEL K LESLEY

PHX MUNICIPAL CT  
REMAND DESK CR-CCC

RULING  
AFFIRM DISMISSAL

PHOENIX CITY COURT

Cit. No. 5984072

Charge:     3.     DRIVING A MOTOR VEHICLE WHILE UNDER THE  
                      EXTREME INFLUENCE OF INTOXICATING LIQUOR  
                      4.     DUI/ALCOHOL  
                      5.     DRIVING A MOTOR VEHICLE WITH A BLOOD ALCOHOL  
                              CONCENTRATION OF .10 OR MORE

DOB:   03-18-1963

DOC:   12-03-2000

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A).

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This matter has been under advisement since oral argument on September 10, 2001. This decision is made within 30 days of that date as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered the argument presented by counsel, their memoranda, and the record of the proceedings from the Phoenix City Court.

Appellee, Jeffrey Scott Thoren, was arrested on December 3, 2000, and charged with Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor, in violation of A.R.S. Section 28-1381(A)(1); Driving With an Alcohol Concentration of .10 or Higher, a class 1 misdemeanor, in violation of A.R.S. Section 28-1381(A)(2); Driving a Motor Vehicle with an Alcohol Concentration of .18 or Higher (Extreme DUI), a class 1 misdemeanor, in violation of A.R.S. Section 28-1382; Failure to Control Speed to Avoid a Collision, a civil traffic violation, in violation of A.R.S. Section 28-701(A); and Failure to Remain at the Scene of an Injury Accident, a class 1 misdemeanor, in violation of A.R.S. Section 28-661(A)(2).

After his arrest, Appellee stated that he would not take a breath test without speaking with to his attorney first.<sup>1</sup> Phoenix Police Office M. J. Heaps incorrectly told Appellee that he was not entitled to talk to an attorney about the breath test.<sup>2</sup> Appellee took the breath test and did so without any opportunity to talk to an attorney prior to taking the test.<sup>3</sup>

The issue before the trial judge was the proper remedy for the violation of Appellee's right to counsel. The trial judge chose to dismiss the case rather than suppress the breath test results. Appellant claims the trial court erred.

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<sup>1</sup> Reporter's Transcript of April 19, 2001, at p. 5, 56.

<sup>2</sup> Id. at p. 64-65.

<sup>3</sup> Id. at p. 66.

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Citing State v. Rosengren<sup>4</sup>, Appellant claims that the trial judge improperly dismissed the case without any finding that Appellee's right to counsel violation had foreclosed a fair trial by preventing the Appellee from collecting exculpatory evidence that is no longer available.<sup>5</sup> In Rosengren, the Defendant/Appellee was charged with manslaughter, not driving while under the influence of intoxicating liquor. The trial judge granted the Defendant/Appellee's Motion to Suppress Evidence of a Breath Test based upon a violation of the Defendant/Appellee's right to counsel. The court noted:

For several reasons, we find no error in that ruling. First, violation of the right to counsel and the concomitant due process right to gather independent evidence of sobriety requires outright dismissal only if evidence of intoxication is essential to the prosecution of the offense (citations omitted).<sup>6</sup>

Further, the court stated:

And, as the trial court correctly noted, most of the cases in which dismissal was required involved police interference with a DUI suspect's ability or attempt to obtain independent blood testing (footnote omitted).<sup>7</sup> This case does not present such concerns.

The trial judge correctly concluded that the appropriate remedy for a violation of Appellee's right to counsel in making the decision whether to submit to a blood or breath test was a dismissal of the case.

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<sup>4</sup> 199 Ariz. 112, 14 P.3d 303 (App. 2000).

<sup>5</sup> Appellant's Memorandum at p. 4.

<sup>6</sup> 14 P.3d at 309.

<sup>7</sup> Id.

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IT IS THEREFORE ORDERED affirming the judgment of the  
Phoenix City Court dismissing this case.